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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1197

BRYANT-BUCKNER ASSOCIATES, INC., *Petitioner,*

v.

THE DANVILLE TOBACCO ASSOCIATION, a corporation; PRODUCERS TOBACCO COMPANY INC.; DANVILLE WAREHOUSE COMPANY, INCORPORATED; *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRYANT-BUCKNER ASSOCIATES, INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on January 25, 1967.

OPINIONS BELOW

The opinion of the court below on the first appeal (Appendix A, *infra*, pp. A1-A16) is reported at 333 F. 2d 202. The report of the Federal Trade Commission to the district court (BB 14-37),[1] made pursuant to the direction

[1] The record consists of the Joint Appendix on the first appeal (cited as "JA"), together with the separate Appendixes filed on the second appeal by the petitioner (cited as "BB"), by respondent Danville Tobacco Association (not cited) and by respondent Producers Tobacco Company (similarly not cited).

of the court below on the first appeal, is not reported. The opinion of the district court rejecting the Federal Trade Commission's report (BB 63-98) is reported at 250 F. Supp. 357. The opinion of the court below on the second appeal (Appendix B, *infra*, pp. A17-A30) has not yet been reported.

JURISDICTION

The judgment of the court below here sought to be reviewed (Appendix C (2), *infra*, p. A32) was entered on January 25, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether regulations of a trade association governing an interstate tobacco market that provide a system of allocating selling time under which the allocation made to qualifying warehouse space that is owned by a new member of the association is substantially less (by 15 to 25 per cent) than the allocation made to qualifying space that is owned by old members of the association constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, or an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act, or both.

2. Whether the recommendation of the Federal Trade Commission (which was submitted in response to the direction of the court below on the first appeal), that the regulations to be adopted should not discriminate against a new entrant's ability to enter the market or, after getting in, to compete on an equal basis with presently established operators, was properly rejected, first by the special master, then by the district court, and finally by the court below, on the basis of "the rightfulness of a diminution of a newcomer," in this instance on the footing that to diminish a newcomer by from 15% to 25% was reasonable.

3. Whether, even in the absence of objection by the parties, the district court could properly appoint as special master in the cause a layman who had already expressed, as a witness on behalf of a party, his own opinions on the merits of the controversy; who was the executive of a trade association whose members were vitally interested in the outcome of the litigation; and who after the plan he had presented was condemned as improper by the Federal Trade Commission, then submitted a report disagreeing with the Commission, which report was approved by the district court in a judgment thereafter affirmed by the court below.

STATUTES INVOLVED

1. Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) provides in pertinent part that—

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

2. Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)) provides in pertinent part that—

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

3. Section 2 of the Tobacco Inspection Act (Act of August 23, 1935, c. 623, 49 Stat. 731) now 7 U.S.C. § 511a, provides as follows:

> **"§ 511a. Declaration of purpose**
>
> "Transactions n tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects

the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein."

STATEMENT

The severely abbreviated narrative that follows sets forth only sufficient facts to place in their setting the issues presented by this petition.

A. Summary recital of the basic controversy

This case involves the legality of the regulations under which selling time is allotted to the tobacco warehousemen on the Danville, Virginia, tobacco auction market, in a situation where the time allotted determines each warehouseman's gross earning power (JA 219a).

The background of the allocation process rests on the restriction of sales for any one day to 8800 baskets of tobacco (*infra*, p. A4; 333 F. 2d at 204). The validity of that restriction is not disputed; the controversy turns on the method employed to divide the 8800 baskets of daily sales among the several warehousemen on the Danville market.

Originally, The Danville Tobacco Association (hereinafter "Tobacco Association") operated under rules providing that each member's allocation of selling time would be its rateable percentage of the total warehouse space on the market, even though such space included areas not used for the sale of leaf tobacco at auction (JA 239a-240a; BB 26; 333 F. 2d at 204, *infra*, pp. A4-A5).

When petitioner Bryant-Buckner Associates, Inc., which had joined Tobacco Association, announced its intention of entering the market in March 1962, with a proposed warehouse containing from between 165,000 to 170,000 square feet (JA 195a, 255a), Tobacco Association adopted a new regulation whereby a new entrant would be granted, not selling time based on its rateable percentage of space, but only 40% thereof, with provisions for 15% increases annually thereafter so that it could not be up to the level of the old regulations until its fifth year (333 F. 2d at 204-205; *infra*, pp. A6-A7).

Bryant-Buckner responded to the new regulation by a proposal to enlarge its contemplated new warehouse first to 420,000, and then to 500,000 square feet, posted bond, and eventually contracted for the construction of 268,792 square feet, of which in actual fact only 168,280 have been built up to now (JA 264a-265a, 188a, 192a-194a, 258a, 419a; BB 19 n. 2).

The present litigation began as an action for a declaratory judgment, brought by Tobacco Association on the same day it adopted the new restrictive regulation, seeking a declaration that this regulation was valid; Bryant-Buckner counterclaimed for a declaration of its invalidity under the antitrust laws (333 F. 2d at 205; *infra*, p. A7).

The district court held the new regulation unreasonable, but denied Bryant-Buckner's motion for summary judgment and decreed allocations of selling time for the 1962 season under which Bryant-Buckner would receive about 85% of the selling time to which it would have been entitled under Tobacco Association's pre-1962 regulations (333 F. 2d at 206; *infra*, pp. A8-A9).

This decree by its terms was subject to further action by Tobacco Association, which approved it (*ibid.*).

Following the events just set forth, there was a reference to a master—a layman and an executive of the Bright

Belt Tobacco Warehouse Association since 1945, who had already testified as a witness for one of the parties, expressing himself as opposed to competition and in favor of restrictions on a new entrant (*infra*, pp. 10-11).

Thereafter the district court, using its 1962 allocations as a starting point, proceeded to order allocations of selling time for subsequent seasons—a permanent plan—which as as applied to Bryant-Buckner's actually built warehouse came to only 724 baskets, or 83.5 per cent of what it would have had under Tobacco Association's pre-1962 rules, and under which Bryant-Buckner could not increase its allocation by more than 8 per cent thereof in any subsequent year (333 F. 2d at 206-207; *infra*, pp. A9-A10).

Under the provisions of the permanent plan, new entrants would be subject to a 25 per cent diminution in respect of their first unit of 87,500 square feet of storage space, a 50 per cent diminution in respect of their second unit, and a 75 per cent diminution in respect of each unit thereafter. These restrictions did not apply to warehouses on the market prior to the 1962 season (333 F. 2d at 206-207).

The permanent plan (JA 130a-139a) also provides (¶ 1, JA 135a) that "all selling time shall be considered as though allocated to warehouse property and shall follow that property," but forbids transfers of selling time from any warehouse that has been on the market less than three seasons (¶ 1, JA 137a).

The district court's order adopting the permanent plan was similarly subject by its terms to approval by Tobacco Association, and, following such approval, was embodied in a final decree from which Bryant-Buckner appealed.

The court below affirmed all of the district court's interim rulings, but suspended so much of the decree as approved the permanent plan, and remanded the case with directions "to refer the permanent plan forthwith to the

Federal Trade Commission, requesting it to investigate and advise the Court upon the validity of the proposed plan or to prescribe an appropriate plan" (*infra*, p. A15; 333 F. 2d at 209).

This was done, and the Federal Trade Commission proposed modifications of the permanent plan, the substance of which was, first, that both old and new entrants should be treated on an equality, and, second, that the only warehouse space that should be considered for the purpose of allocating selling time should be space actually used for the selling of tobacco (BB 14-37). Under this plan the allotment of selling time to Bryant-Buckner would have been substantially increased, to 975.85 baskets (BB 36).

The Commission's proposals were referred to the master for comment and recommendation, the interim plan having meanwhile been approved by the district court for the 1965 selling season, after having been used also for the 1964 season (BB 38).

The master recommended that "the Danville Plan retain its present provision for diminution of a newcomer" (BB 51), saying (BB 50):

> "It is the firm opinion of the Special Master that to permit a newcomer to enter the market on a complete parity with the average established warehouse is an invitation for newcomers to come in for the purpose only of acquiring selling time for negotiation and disposition."

Accordingly, he recommended (BB 52) that the Federal Trade Commission's recommendation be not adopted, that "the recommendation of the Federal Trade Commission that there be no diminution whatever because of an entrant being a newcomer be not adopted," and that the Danville Plan be adopted as a permanent plan (BB 52). Bryant-Buckner excepted (BB 53-63).

The district court in its opinion (BB 63-98; 250 F. Supp. 357) approved the recommendations of the master, approved the Danville Plan for the 1966 and 1967 seasons and as a permanent plan, and dismissed the action (BB 99), concluding as a matter of law that (BB 97):

> "6. Diminution to a new entrant of 25% from the average selling time for a first basic unit is not unreasonable or unfair or illegal where there are, as in this case, regulations which permit gain and loss based on experience and limited to not more than 8% of any of the selling time of any warehouse in any year.
>
> "7. The limit of gain or loss because of experience in any year to 8% is not unfair, discriminatory or illegal."

On appeal by Bryant-Buckner (BB 100), the court below once more affirmed (*infra*, pp. A17-A30, A32). It sustained as reasonable the 25% diminution of the newcomer on the ground that it properly discouraged surplus building, and sustained the district court's rejection of the Commission's plan on the ground that it would be disruptive, and (*infra*, p. A28) that "A general rearrangement could also penalize warehousemen who had not contributed to overbuilding."

B. Petitioner Bryant-Buckner's diminution of selling time under the several plans put into effect following its entrance into the market

Just before petitioner Bryant-Buckner announced its intention to compete in the Danville Tobacco market, the total area of all floor space there was 1,400,451.7 square feet (JA 48a, 74a (¶ 4), among which the daily number of 8800 baskets was allotted on a rateable basis.

Bryant-Buckner then built a warehouse with 168,280 square feet (BB 19 n. 2), and the Warren firm built an additional 140,000 square feet (JA 268a). This brought the aggregate space on the Danville market to 1,708,731.7 square feet. Bryant-Buckner's percentage of this total

was 9.8482, which would have entitled it to 867 baskets under the pre-1962 rules.

The new rule adopted immediately after Bryant-Buckner announced its entry (Art. II(c) *infra,* pp. A6-A7) would have allowed it only 40% of that amount for the first year, and would have permitted an additional 15% in each of the following years, so that instead of 867 baskets it would have been limited as follows: First year, 347 baskets; second year, 477 baskets; third year, 607 baskets; fourth year, 712 baskets. Only in the fifth year would it have been back to 867 baskets.

Under the district court's interim plan for 1962, Bryant-Buckner was give 724 baskets (JA 78a, 79a).

Under the permanent plan, now approved by the court below, Bryant-Buckner continues to receive 724 baskets (JA 170a; JA 130a, ¶ 2; JA 171a-173a).

Under the plan recommended by the Federal Trade Commission but successively rejected by the master, the district court, and the court below, Bryant-Buckner would have received 975.85 baskets (BB 36).

All of Bryant-Buckner's allotments were calculated on its actual warehouse area, namely, 168,280 square feet; see district court order of July 7, 1962, at JA 94a; BB 19, n. 2; Federal Trade Commission's proposals at BB 36 and BB 37. The statement twice repeated in the second opinion of the court below (*infra,* pp. A24, A29), that Bryant-Buckner's allotments are calculated on the basis of the 268,792 square feet it has contracted to build rather than on the 168,280 square feet it has actually built, is contradicted by the cited record references.

C. Appointment as master of a layman who was a trade association official and who as an expert witness called by a party had already expressed opinions on the merits of the litigation

Respondent Producers Tobacco Company called as its witness one, Fred S. Royster, a layman (JA 292a) who had been an executive officer of the Bright Belt Tobacco Warehouse Association since 1945 (JA 281a), and who had earlier testified in many tobacco sale lawsuits (JA 304a, 305a, 313a, 471a, 472a, 475a-476a; 244 F. 2d at 473-474 note 3; 266 F. 2d at 638).

Witness Royster expressed his opposition to competition (JA 284a) and to needless building (JA 285a), and his approval of some restrictions on new warehouses entering an existing market (JA 286a-287a, 291a-292a, 294a, 296a) and of permitting the transfer of selling time from house to house within the same firm (JA 303a). He himself owns interests in tobacco warehouses that have allocations of selling time (JA 302a). He expressed the view that the market was more efficient when sales took place in fewer warehouses (JA 303a), and that a sales allotment was a property right that belonged to the particular warehouse (JA 337a-338a). Finally, he testified that he considered fair and reasonable Tobacco Association's 1962 regulation (JA 307a, 308a). (This was the regulation later struck down by the district court; JA 76a, ¶ A.)

Thereafter, without expressed objection on the record (JA 343a), the district court appointed the witness Royster "Master in this action" to conduct hearings and to make recommendations to the Court for a plan to be adopted by Tobacco Association for 1963 and subsequent years (JA 54a-55a).

Following his appointment, Master Royster returned to the witness stand for further cross-examination by counsel for the parties, when he said (JA 470a), "I don't think he [the newcomer] is entitled to share equally with the people

that are already engaged in the business, and have built up the market in coming in."

Hearings were held before the Master (JA 5a, 6a, 541a-569a), after which the recommendations in his final report (JA 110a-142a) were, subject to minor modifications only (JA 164a-166a), approved by the district court "in their entirety" (JA 166a-168a). These recommendations became the "permanent plan," briefly summarized above at page 6, the affirmance of which by the court below is now in issue.

Appointment of the witness Royster as master was sustained on the first appeal, the court below saying (*infra*, p. A13; 333 F. 2d at 208) that " 'Master' was a misnomer. In truth he did not serve as a master in the sense of being a commissioner of reference or master in chancery. • • • the Court chose him as an expert for its guidance."

Following the remand and the coming in of the Federal Trade Commission's report, the latter document was by the district court referred to Royster as "Special Master" (BB 38-39). Signing himself "Special Master" (BB 52), he recommended rejection of the Commission's plan and adoption of the permanent or "Danville Plan" (BB 52). Once again, Special Master Royster took the witness stand to testify under oath (BB 168-179). The district court then approved his recommendations in an opinion (BB 63-98; 250 F. Supp. 357) in which Royster was consistently referred to as "Special Master" (BB 63, 64, 71, 79, 83, 84, 86, 92, 93, 94, 95, 96, 97, 98), and in which his expertise was found as a fact (Fdg. 1, BB 94). And the court below, in affirming the district court's approval of Royster's rejection of the Federal Trade Commission's recommendations, similarly referred to him as "special master" (*infra*, p. A23, note 3).

REASONS FOR GRANTING THE WRIT

Nearly 70 per cent of all the tobacco produced in the United States is marketed at auction within the States comprising the Fourth and Fifth Circuits.* In no less than five separate judicially reported instances during the past decade, business units seeking to enter the tobacco marketing business in those States have been met upon entry by changes made by the local trade associations in the rules that govern the allocation of selling time among their members, changes that placed the several new entrants at a substantial competitive disadvantage in relation to the marketing concerns already in the business. Yet in no less than eight appeals by the new entrants in those five instances, what the court below on the first appeal in this case called (*infra*, p. A12) "the rightfulness of a diminution of a newcomer" has been consistently approved by both the Fourth and Fifth Circuits. *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 (C.A. 5); *Rogers* v. *Tobacco Board of Trade*, 266 F. 2d 636 (C.A. 5), certiorari denied, 361 U.S. 833; *Asheville Tobacco Board of Trade* v. *FTC*, 263 F. 2d 502 (C.A. 4); *Asheville Tobacco Board of Trade* v. *FTC*, 294 F. 2d 619 (C.A. 4); *Roberts* v. *Fuguay-Varina Tobacco Board of Trade*, 332 F. 2d 521

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* *Annual Report on Tobacco Statistics 1965*, U.S. Department of Agriculture, Consumer and Marketing Service, April 1966 (Statistical Bulletin No. 372) pp. 31-35, Table 10, Sales and average prices of tobacco sold at auction, by types, State and markets, crops of 1961-65.

We have used the 1964 figures since the statistics on Kentucky and Tennessee Burley tobacco for 1965 were not available; and in respect of Maryland, where 1963 was the latest year reported, we have used the figures for that year.

The totals come to 1,471,131,000 pounds of tobacco sold in the states comprising the Fourth and Fifth Circuits, and 638,999,000 pounds in the remaining states; the precise percentage is therefore 69.7%. A map showing all tobacco auction markets and producing areas in the United States appears at p. 5 of the cited publication.

(C.A. 4), affirming 223 F. Supp. 212 and 220 F. Supp. 608 (E.D.N.C.); *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* 333 F. 2d 202 (C.A. 4) (first appeal in this case); *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* C.A. 4 No. 10579, decided January 25, 1967 (opinion below in this case); *Eagles* v. *Harriss Sales Corporation,* 368 F. 2d 927 (C.A. 4).

We submit that it is now time for this Court to apply to the business of tobacco marketing in interstate commerce its rule that, just as it is illegal under the Sherman Act to exclude a new entrant from interstate commerce altogether (*Associated Press* v. *United States,* 326 U.S. 1), so also is it an unreasonable restraint *per se* to foreclose competitors from any substantial part of the market (*Fashion Originators Guild* v. *Federal Trade Comm.,* 312 U.S. 457; *International Salt Co.* v. *United States,* 332 U.S. 392). That rule was applied by the Sixth Circuit to the business of auctioning tobacco in *Bale* v. *Glasgow Tobacco Board of Trade,* 339 F. 2d 281, affirming 223 F. Supp. 739 (W.D. Ky.), and by the First Circuit to the sale of produce in *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.,* 194 F. 2d 484.

First. Mention of some fundamentals will serve to simplify and to narrow the discussion that follows. This Court's decisions make it plain that the sale of tobacco is in interstate commerce (*Townsend* v. *Yeomans,* 301 U.S. 441; *Currin* v. *Wallace,* 306 U.S. 1; *American Tobacco Co.* v. *United States,* 328 U.S. 781), and Congress has not only regulated such sales since 1935 pursuant to the Tobacco Inspection Act (now 7 U.S.C. §§ 511-511q), imposing also other controls (Tobacco Control Act, 7 U.S.C. §§ 515-517; Agricultural Adjustment Act of 1938 as amended, 7 U.S.C. §§ 1311-1316), it has specifically declared that "Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest" (7 U.S.C. § 511a, set forth in full at pp. 3-4, above).

And the court below had specifically held in an earlier decision involving Tobacco Association that this body could not lawfully exclude a new entrant from the market altogether (*American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869 (C.A. 4)), and had in another earlier decision squarely rejected the proposition that because tobacco boards of trade operated under the authority of State law they are thereby empowered to restrain trade without regard to the prohibitions of the Sherman Act (*Asheville I*, 263 F. 2d at 508-510).

Finally, whatever may be the permissible scope of State regulation in the face of the extensive Federal legislation governing the sale of tobacco, a question on which this Court divided in *Campbell* v. *Hussey*, 368 U.S. 297, it is plain that the business of selling tobacco at auction does not transform tobacco warehouses into public utilities so that prospective entrants into the business must face the restraints inherent in the concept of public convenience and necessity. After all, "Immunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Comm.*, 369 U.S. 482, 485. Consequently, as the court below held in the earlier Danville case (*American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869, *supra*), and as the Federal Trade Commission indicated in its report in this case (BB 14-37), the legal principles governing sales of tobacco at auction are found in the Sherman Act's prohibition against unreasonable restraints of trade, and in the Federal Trade Commission Act's prohibition of unfair trade practices.

Second. The differences between the practices approved by the court below in this and other cases, and the elements of the plan proposed by the Federal Trade Commission in this case, submitted at the invitation of the court below and then rejected by it, are sharp and clear.

The court below and the Fifth Circuit have consistently held that restrictions may properly be placed on a new entrant into the market to discourage "overbuilding"

(*Asheville I*, 263 F. 2d at 511; *Asheville II*, 294 F. 2d at 622; *Rogers I*, 244 F. 2d at 481). Indeed, the court below in the ruling now sought to be reviewed has emphasized what it deems the great undesirability of upsetting the *status quo* in order to admit a newcomer to the market on equal terms (*infra*, pp. A28-A29).

Contrariwise, the Federal Trade Commission, in this case and in other rulings, has emphasized the requirement of equality of treatment (*Rogers I*, 344 F. 2d at 480-481; *Asheville II*, 294 F. 2d at 622). In this case it undertook to limit overbuilding by provisions whereby no warehouseman would be able to obtain credit for warehouse space not actually used for the sale of tobacco but that was diverted to other purposes—i.e., space "built for survival, not to sell tobacco in" (JA 452a)—and by other provisions whereby additional space after the first unit would receive less credit for selling time. But the heart of the Commission's plan was that old and new entrants were to be treated on an equality in respect of both limitations.

The Commission's concept of equality was rejected by the district court, which held (BB 95) that "The diminution to a newcomer of 25% from full average initial selling time credit is reasonable and fair," and which approved the many other provisions of the master's original permanent plan that operated to a new entrant's disadvantage (*supra*, p. 6). And the court below approved the rejection of the Commission's plan on the ground that it would be "particularly and unwarrantably disruptive at Danville" (*infra*, p. A28). Otherwise stated, the court below has approved retention of the restraints contained in the existing situation in preference to the readjustment that the commands of the antitrust laws plainly require.

Ironically enough, although the court below in the recent treble-damage case from the Wilson, North Carolina, tobacco market (*Eagles* v. *Harriss Sales Corporation*, *supra*, 368 F. 2d at 931) criticized the new entrants there because "They forewent their right to seek redress before

the Federal Trade Commission. * * * As we have previously said, the Commission rather than the courts has the expertise, the power and the implements to explore and correct unfair trade regulations," in the present case the court below deliberately rejected the Commission's expertise—which it had earlier directed the district court to request (*infra*, pp. A15, A31).

Third. The result of the petrification of the present competitive situation thus imposed on the Danville tobacco market is that petitioner Bryant-Buckner is now in a less favorable position than it would have been in had it accepted Tobacco Association's 1962 40% regulation that the district court condemned (JA 76a), condemnation never made the subject of a cross-appeal by any party. Under those provisions Bryant-Buckner would have attained to 100% by its fifth year in the market. Now, having litigated that palpably unlawful restraint, it finds itself five years later, not with 100%, but with only 83.5% of the time it should have had at the outset. Thus petitioner is now in worse case than it would have been in had it never challenged the crass and illegal restraint that was originally interposed against its entry into the market.

Fourth. Although in our view the permanent plan approved by both courts below involves on its face a violation *per se* of the antitrust laws, we cannot omit to notice that this plan was drawn, and the Federal Trade Commission's counter-proposal was recommended for rejection, by a Special Master who originally appeared as a witness for a party, who in the course of testifying had expressed opinions on the merits of the controversy, and who was then and for some 14 years previously had been the operating head of a tobacco warehousemen's trade association, in which capacity he had developed himself into virtually a professional witness (*supra*, p. 10).

Assuming that the lack of objection to his appointment and the acquiescence thereafter in his functioning amounted to express consent, it is our position that what was done

here could no more have been legalized by the consent of the parties than it could have been imposed by legislation, even by an Act of Parliament "with the common consent of the realm."

For the principle that no one may be a judge in his own cause is so fundamental that, long before any doctrine of judicial review had even been tentatively suggested, Lord Coke twice laid it down that not even Parliament could validly authorize a party to be judge in his own cause. *Bonham's Case,* 8 Co. Rep. 114a, 118a; *Day* v. *Savadge,* Hob. 85, 88 ("because even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself"). Chief Justice Holt expressed himself to the same effect. *City of London* v. *Wood,* 12 Mod. 669, 687-688 ("and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; * * * but it cannot make one that lives under a Government Judge and party."). And compare *Dimes* v. *Grand Junction Canal,* 3 H.L. Cas. 759, where the House of Lords reversed the decree of a Lord Chancellor who, unbeknownst, had been a shareholder of the corporation involved in the litigation.

In the case of *In re Murchison,* 349 U.S. 133, 136, this Court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

On the first appeal the court below rejected Bryant-Buckner's contention that the master was disqualified, saying that " 'Master' was a misnomer," and that he was simply an expert guiding the court as in other scientific cases, citing *Scott* v. *Spanger Bros.,* 298 F. 2d 928, 930 (C.A. 2) (*infra,* pp. A13-A14).

But that approach not only disregarded the fact that Royster had been specifically appointed as master *eo nomine* (JA 54a-55a), it brushed aside the more important aspect of Royster's disqualification, which was that, as an expert witness in this very cause prior to his appointment as master, he had expressed opinions on the merits of the controversy (*supra*, p. 9).

In the recent case of *American Cyanamid Company* v. *FTC*, 363 F. 2d 757, the Sixth Circuit set aside the order of the Federal Trade Commission because its chairman had earlier participated as counsel to a congressional committee in the same controversy that later came before him as a member of the regulatory agency. Similarly, the District of Columbia Circuit has set aside administrative orders where a member of the agency had earlier been counsel or investigator in the identical proceeding. *Amos Treat & Co.* v. *Securities & Exchange Comm.*, 306 F. 2d 260; *Trans World Airlines* v. *Civil Aeronautics Board*, 254 F. 2d 90.

The principle governing all of these decisions is that one who has been or has represented a party may not thereafter sit in judgment. Accordingly we submit that it was here similarly improper, to the extent of vitiating the proceedings, for an expert witness who had expressed opinions on the merits of a controversy on behalf of a party thereafter to sit as master and in that capacity to prepare a plan for resolving that controversy.

We have already indicated that we deem the permanent plan drawn by him offensive to the antitrust laws regardless of its authorship. But we think this Court may also wish to review the procedural aspects of this case, wherein the regulation formulated by the Federal Trade Commission by reason of an invitation initiated by the court below was rejected in favor of another plan drawn by the head of a trade association, who had earlier testified as a witness, and where the ex-witness as master then successfully recommended rejection of the Commission's plan.

Fifth. Simply to show that the point has not been overlooked, we note that the first judgment of the court below directed a remand and a reference to the Federal Trade Commission (Appendix C(1); *infra,* p. A31); it was therefore not a final judgment. Consequently all of the points raised on the first appeal to the court below remain open now on review of the second appeal. *United States* v. *United States Smelting Co.,* 339 U.S. 186.

CONCLUSION

The decision below effectively immunizes a large percentage of the country's sales of tobacco by auction from the prohibitions of the antitrust laws against unreasonable restraints of trade and unfair trade practices. More than that, the ruling below rejects the views of the Federal Trade Commission, which it had invited, in favor of those of a special master who had earlier expressed opinions on the merits of the controversy as an expert witness on behalf of a party. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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